STATE OF MICHIGAN

COURT OF APPEALS

LADONNA CUNNINGHAM,

Plaintiff-Appellant,

v

MCKINLEY, INC. and POINTE WEST APARTMENTS,

Defendants,

and

JOHN P. CARROLL CO., INC.,

Defendant/Cross-Plaintiff-Appellee,

and

PALMER ROAD DEVELOPMENT, L.L.C.,

Defendant/Cross-Defendant-Appellee.

UNPUBLISHED
February 13, 2014

No. 313062
Wayne Circuit Court
LC No. 10-012096-NO

Before: MURPHY, C.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

In this suit to recover damages arising from a fall, plaintiff Ladonna Cunningham appeals of right the trial court's order dismissing her claims against defendant Palmer Road Development, LLC (Palmer Development) under MCR 2.116(C)(10). Because we conclude there were no errors warranting relief, we affirm.

I. BASIC FACTS

Sometime before her fall, Cunningham moved into an apartment leased by Leann Gale from Palmer Development. Cunningham testified that the apartment's living quarters were on the second floor and that she had to go down a set of carpeted stairs to go outside. In April 2009, Cunningham went to check the mail and fell down the stairs.

Cunningham sued various parties associated with the apartment complex, including the complex's management company, John P. Carroll Co., Inc. (Carroll Company), to recover damages for the injuries she sustained in her fall. Palmer Development, which owns the complex, became involved after Carroll Company sued it to recover the costs that Carroll Company incurred defending the lawsuit.[1]

Palmer Development moved for summary disposition on the grounds that it had no statutory duty to Cunningham because she was not a lessee and had no common law duty to her because the torn carpeting constituted an open and obvious hazard. The trial court agreed and dismissed her claims under MCR 2.116(C)(10) in April 2012.[2] After the trial court resolved the claims between Palmer Development and Carroll Company, Cunningham appealed the trial court's decision to dismiss her claims against Palmer Development.

II. SUMMARY DISPOSITION

A. STANDARDS OF REVIEW

Cunningham argues that the trial court erred when it determined that she was not entitled to the protection afforded to lessees and licensees under MCL 554.139 and erred when it concluded that her common law claim was barred under the open and obvious danger doctrine. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo whether the trial court properly interpreted and applied the relevant statutes, *Kincaid v Cardwell*, 300 Mich App 513, 522; 834 NW2d 122 (2013), and whether it properly applied the common law, *Brecht v Hendry*, 297 Mich App 732, 736; 825 NW2d 110 (2012).

This Court reviews a "motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition is proper "if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.* A genuine issue of material fact exists when reasonable minds could differ on an issue. *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

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[1] The dispute between Carroll Company and Palmer Development is not at issue in this appeal.

[2] We note that Palmer Development moved for summary disposition under both MCR 2.116(C)(8) and (C)(10). However, because the motion involved consideration of evidence outside the pleadings, we shall limit our discussion accordingly. See *Steward v Panek*, 251 Mich App 546, 554-555, 652 NW2d 232 (2002).

B. STATUTORY DUTY

Cunningham first argues that the trial court erred when it determined that Palmer Development did not owe her a duty under MCL 554.139 to keep the apartment fit for its intended use and in reasonable repair. Specifically, she contends that she had an implied contract with Palmer Development, which entitled her to the protections afforded to lessees under that statute.

MCL 554.139(1) provides that, in "every lease or license of residential premises," the lessor or licensor "covenants" that "the premises and all common areas are fit for the use intended by the parties" and to "keep the premises in reasonable repair during the term of the lease or license." As our Supreme Court recently clarified, the covenants required by the Legislature under this statute apply only to contracts between a lessor and his or her lessees or licensees; as such, "a non-tenant could never recover under the covenant for fitness because a lessor has no contractual relationship with—and, therefore, no duty under the statute—to a non-tenant." *Allison*, 481 Mich at 431. Accordingly, a lessor or licensor of residential property does not have a duty under MCL 554.139 to any person with whom he or she does not have a contractual relationship—including a tenant's guests. *Id.*

On appeal, Cunningham relies on the landlord-tenant relationship act, MCL 554.601 *et seq.*, for purposes of determining who constitutes a lessee or licensee under MCL 554.139. However, the Legislature provided that the definitions stated under MCL 554.601 apply only to that act and, to our knowledge, no court has extended that act to MCL 554.139. Instead, we conclude that MCL 554.139 applies generally to any agreement establishing a landlord-tenant relationship or licensor-licensee relationship under the common law.

In examining whether parties have a landlord-tenant relationship, Michigan Courts examine whether the evidence shows that all the necessary elements of a landlord-tenant relationship exist; these include "permission or consent" by the landlord "to occupancy by the tenant, subordination of the landlord's title and rights" to the tenant, "a reversion in the landlord, the creation of an estate in the tenant, the transfer of possession and control of the premises" to the tenant and "a contract, either express or implied, between the parties." *Grant v Detroit Ass'n of Women's Clubs*, 443 Mich 596, 605 n 6; 505 NW2d 254 (1993) (quotation and citation omitted).

Here, Cunningham testified that she believed she had a landlord-tenant relationship with Palmer Development even though she never entered into a lease agreement with Palmer Development because Gale's lease allowed Gale to "have one person live with her without signing the lease." Cunningham's testimony is not supported by the language used in Gale's actual lease, which Palmer Development submitted with its motion. Instead, the lease provided that Gale must use the apartment as a private residence for herself and precluded her from subletting the apartment to others.

Cunningham also argues that the evidence that she complained about the torn carpet to maintenance men is evidence that Palmer Development acquiesced to her co-tenancy under Gale's lease. But evidence that Palmer Development's agents were aware that she was residing with Gale is not evidence that Palmer Development had conveyed a tenancy to Cunningham.

Gale signed the lease at issue and it is undisputed that Cunningham did not seek to be added to the lease as a co-tenant and did not register as an adult resident under Gale's lease. Indeed, Gale indicated on her application to lease the apartment that she was the head of household, had no family members who would be living with her, and indicated that the total number of adults who would be residing at the apartment was one. There was also no record evidence that Cunningham paid rent to Palmer Development or that she would be legally obligated to pay Palmer Development under the terms of Gale's lease or any other agreement. There was also no record evidence that Palmer Development—either explicitly or implicitly—agreed to transfer possession of the apartment to Cunningham for consideration. *Grant*, 443 Mich at 605. The evidence submitted before the trial court established that Gale alone had a landlord-tenant relationship with Palmer Development; there was no evidence that Cunningham was a party to Gale's lease or an intended beneficiary under that lease; as such Cunningham failed to establish that she was entitled to the protections afforded under MCL 554.139 as a lessee.

Cunningham also argues that, even if she was not Palmer Development's lessee, she was nevertheless a licensee under MCL 554.139. A "license" is an agreement permitting the licensee "to do some act or series of acts on the land of the licensor without having any permanent interest in it," or that "grants permission to be on the land of the licensor without granting any permanent interest in the realty." *Kitchen v Kitchen*, 465 Mich 654, 659; 641 NW2d 245 (2002). Although a land owner may orally convey a license, *id.* at 661, Cunningham did not present any evidence that Palmer Development actually agreed to give her any rights to which the covenants provided under MCL 554.139 could apply. See *Allison*, 481 Mich at 425-426 (explaining that MCL 554.139 provides additional protections for lessees and licensees by adding the legislatively mandated terms to the lease or license, which may then be enforced through an action for breach of contract). Rather, the record evidence established that Gale gave Cunningham permission to reside at her apartment and Palmer Development's agents either knew or should have known that Cunningham was residing with Gale. At best, this evidence establishes that Cunningham was Gale's long-term guest—it does not amount to evidence that Palmer Development entered into an agreement with Cunningham. Accordingly, Cunningham was not a licensee for the purposes of MCL 554.139.

Because Cunningham failed to establish that she was a lessee or licensee of Palmer Development, the trial court did not err when it determined that Cunningham could not assert a claim for breach of the covenants mandated under MCL 554.139.

C. COMMON LAW PREMISES LIABILITY

Cunningham next argues that, even though she knew about the torn carpet and the danger that it posed, the hazard involved special aspects that removed it from application of the open and obvious danger doctrine. Specifically, she argues that the torn carpet was effectively unavoidable and unreasonably dangerous.

Here, it was undisputed that Cunningham was Gale's guest and, therefore, an invitee. *Stanley v Town Square Coop*, 203 Mich App 143, 147-148, 512 NW2d 51 (1993). "In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). But the duty does not

encompass removal of open and obvious dangers unless "special aspects of a condition make even an open and obvious risk unreasonably dangerous . . . ." *Id.* at 517. Michigan Courts have recognized two special aspects that will render an otherwise open and obvious hazard actionable: the hazard is "effectively unavoidable" or poses "an unreasonably high risk of severe harm." *Id.* at 518.

"Unavoidability is characterized by an *inability to be avoided*, an *inescapable* result, or the *inevitability* of a given outcome." *Hoffner v Lanctoe*, 492 Mich 450, 468; 821 NW2d 88 (2012). Further, "a hazard must be unavoidable or inescapable *in effect* or *for all practical purposes*." *Id.* A commercial building with only one exit for the general public where the floor is covered with standing water constitutes an effectively unavoidable hazard. *Lugo*, 464 Mich at 518. An icy entrance to a business does not, in contrast, constitute an unavoidable hazard because a prospective patron can refuse to enter the business. *Hoffner*, 492 Mich at 473. With regard to an unreasonably dangerous condition, the hazard "must be *more than* theoretically or retrospectively dangerous, because even the most unassuming situation can often be dangerous under the wrong set of circumstances." *Id.* at 472. It must present an extremely high risk of severe harm to an invitee in circumstances where there is no sensible reason for such an inordinate risk of severe harm to be presented. *Id.* at 462.

Cunningham argues that the torn carpet was effectively unavoidable because she had no other option than to use the stairs outside her apartment to leave. However, the photo evidence showed that the tear was on one side of the stairs and Cunningham admitted that she could have gone down the steps on the side closest to the railing and thus avoid the tear. Indeed, she testified that she went down the side with the tear out of habit: "It was just me to get off my couch and walk that way. It was no particular reason." Given the evidence presented on the motion, there was no material dispute that the tear was avoidable. *Id.* at 468.

We also do not agree that the hazard at issue posed an "unreasonably high risk of severe harm." *Lugo*, 464 Mich at 518. There was insufficient record evidence concerning the nature and extent of the deteriorated carpet to permit an inference that the carpet's condition sufficiently increased either the risk of a fall from the top of the steps or the severity of the harm that would result from such a fall; as such, there was insufficient evidence to establish that the hazard met the special aspects exception. See *id.* at 519 (explaining that there must be evidence that the condition had special aspects that gave rise to a "uniquely high likelihood of harm" or increased the "severity of harm" in order to remove the condition from application of the open and obvious danger doctrine).

Relying on *Bertrand v Alan Ford, Inc*, 449 Mich 606; 537 NW2d 185 (1995), and *O'Donnell v Garasic*, 259 Mich App 569; 676 NW2d 213 (2003), abrogated not in relevant part *Mullen v Zerfas*, 480 Mich 989; 742 NW2d 114 (2007), Cunningham contends that the deteriorated carpet was sufficiently dangerous given its placement to constitute a special aspect under the exception. In *Bertrand*, a customer fell after holding a door open for other customers. *Bertrand*, 449 Mich at 621-622. The Court determined that summary disposition for the defendant was inappropriate because there was evidence that the step was unreasonably dangerous given the placement of a vending machine and the cashier's window near the step along with the hinging of the door. *Id.* at 624. Similarly, in *O'Donnell*, the plaintiff fell on stairs that were narrow, partially unguarded by a handrail, and featuring a light switch that could only

be turned on at the bottom of the stairs. *Id.* at 571-572. The Court held that, under the totality of the circumstances, the hazard posed by the stairs was unreasonably dangerous. *Id.* at 577-578.

In both cases, there was evidence that the risk of falling, the nature of the harm, or both, were significantly increased under the totality of the circumstances. The record here, however, does not permit a similar inference because there was no testimony or evidence tending to permit an inference that the carpet's condition increased the risk of a fall. Indeed, Cunningham testified that she did not know what caused her fall; hence, it is not even clear that the carpet played a role in the fall at issue. On this record, we cannot conclude that the stairs, even with the torn carpet, met the special aspects exception.

III. CONCLUSION

The trial court did not err when it dismissed Cunningham's claims against Palmer Development.

Affirmed.

/s/ William B. Murphy
/s/ Michael J. Kelly
/s/ Amy Ronayne Krause